Supreme Court, U.S.
FILED
DEC 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-450

In the Supreme Court of the United States

OCTOBER TERM, 1989

TEXAS MEDICAL ASSOCIATION, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENT

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-450

TEXAS MEDICAL ASSOCIATION, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENT

Pursuant to Rule 22.6 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully files this supplemental brief to call the Court's attention to a provision in the pending omnibus reconciliation bill for fiscal year 1990 (H.R. 3299, 101st Cong., 1st Sess. (1989)) that may have a bearing on the underlying merits of this case.

Petitioners brought this suit to enjoin the Secretary of Health and Human Services and Blue Cross and Blue Shield of Texas, Inc. (BCBST), the carrier that administers the Part B Medicare program in Texas, from recovering overpayments that were erroneously made by BCBST to physicians and Part B beneficiaries. The overpayments were made during the period between July 1985 and March 1986 for

certain categories of services that BCBST had not yet switched to a nationwide coding system adopted by the Health Care Financing Administration. The court of appeals held that under this Court's decisions in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), and *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), judicial review is precluded because petitioners' suit is essentially a challenge to the amount of reimbursement under Part B. For the reasons stated in our brief in opposition, that ruling is correct. The decision below does not in any event warrant review because there is no circuit conflict and because the legal issue concerning the availability of judicial review under *Erika* and *Michigan Academy* is not of substantial continuing importance in light of Congress's amendment of the Act to provide for judicial review of the amount of reimbursement under Part B for services rendered after January 1, 1987.

Section 6109 of the omnibus reconciliation bill, a copy of which is appended hereto (135 Cong. Rec. H9367 (daily ed. Nov. 21, 1989)), specifically addresses the subject of overpayments made by a Medicare carrier between July 1, 1985, and March 31, 1986, as a result of statewide fees established while the carrier was switching to the new coding system. If enacted into law, Section 6109 would "prevent any recoupment, or other decrease in subsequent payments, to the physician or individual." This prohibition would apply to claims for services that were reopened by carriers on or after July 31, 1987.

Although H.R. 3299 has passed the House of Representatives and the Senate, it has not been signed by the President. In fact, we have been informed by the Office of the Bill Clerk at the White House that the bill has not yet been presented by Congress to the President, pursuant to Article I, Section 7, Clause 2 of the Constitution. Accordingly, even if we assume arguendo that Section 6109 would apply

to bar recovery of all overpayments at issue in this case, the case is not now moot. Nor was the case moot when it was decided by the court of appeals. For that reason, and because review by this Court is not warranted in any event, the petition for a writ of certiorari should be denied even if H.R. 3299 is signed into law before the Court disposes of the petition. Compare *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978), with *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 288, 722-723 & n.28 (6th ed. 1986).

For the foregoing reasons and those stated in our brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

DECEMBER 1989

APPENDIX

Section 6109 of H.R. 3299, 101st Cong., 1st Sess. (1989), as reproduced at 135 Cong. Rec. H9367 (daily ed. Nov. 21, 1989), provides:

WAIVER OF LIABILITY LIMITING RECOUPMENT IN CERTAIN CASES

In the case where more than the correct amount may have been paid to a physician or individual under part B of title XVIII of the Social Security Act with respect to services furnished during the period beginning on July 1, 1985, and ending on March 31, 1986, as a result of a carrier's establishing statewide fees for certain procedure codes while the carrier was in the process of implementing the national common procedure coding system of the Health Care Financing Administration, the provisions of section 1870(c) of the Social Security Act shall apply, without the need for affirmative action by such a physician or individual, so as to prevent any recoupment, or other decrease in subsequent payments, to the physician or individual. The previous sentence shall apply to claims for items and services which were reopened by carriers on or after July 31, 1987.

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—262 203/00638